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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KEVIN HUGHES, Plaintiff and Appellant, v. ONEWEST BANK et al., Defendants and Respondents.	A130897 (Napa County Super. Ct. No. 26-48314)

This appeal has been taken from an order that sustained OneWest Bank and Deutsche Bank National Trust Company's (defendants) demurrer to all of the causes of action of plaintiff's third amended complaint without leave to amend. We find that the demurrer was properly sustained, and no reasonable possibility exists that plaintiff may be able to state causes of action against defendants for wrongful foreclosure, fraud, unfair business practices, or to quiet title. We therefore conclude that the action was properly dismissed in its entirety, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

To finance the purchase of real property in American Canyon, on April 20, 2007, plaintiff executed and delivered to defendant Residential Mortgage Capital (RMC) a promissory note and deed of trust on the property to secure a loan in the amount of $720,000. A series of assignments and transfers of the note and deed of trust ensued, and ultimately a nonjudicial foreclosure sale of the property was conducted by defendant Quality Loan Service Corp. (Quality) on January 15, 2010. Plaintiff's third amended complaint and attached exhibits reveal the following chronology of events.

On April 28, 2007, the promissory note and deed of trust were recorded at the request of RMC, with defendant Mortgage Electronic Registration Services (MERS) designated as beneficiary, and defendant Fidelity National Title (Fidelity) designated as trustee. Effective February 24, 2009, MERS assigned all beneficial interest in the deed of trust to defendant IndyMac Federal Bank FSB (IndyMac).[1] The assignment was recorded on April 21, 2009.

As agent for beneficiary IndyMac, defendant Quality recorded and sent to plaintiff a notice of default and election to sell under deed of trust on March 9, 2009. IndyMac also sent to plaintiff a proposed loan modification agreement (proposed agreement) on March 10, 2009, for his signature and return. The proposed agreement contained modified loan terms, including an increase in the principal balance of the note. By its terms the proposed agreement was not binding on IndyMac unless and until plaintiff was determined to qualify for the modification offer, and it was signed by IndyMac after verification of income information.

Plaintiff signed the proposed agreement on April 4, 2009. The pleading also alleges that plaintiff provided to IndyMac a financial statement and a check in the amount of $2,822.20, as specified in the proposed agreement.

IndyMac, acting in its capacity as beneficiary, filed and recorded a substitution of trustee (substitution) on April 21, 2009, that designated Quality as trustee under the deed of trust. The substitution indicated that IndyMac was the current beneficiary in place of MERS.

In a letter from IndyMac received on June 8, 2009, plaintiff was informed that the check for $2,822.20 he previously tendered "does not represent the total amount due at this time." Plaintiff was also advised in the letter to contact the IndyMac office "immediately for the amount required to bring your loan current." Plaintiff's check was returned with the letter.

[1] IndyMac has been dissolved as a business entity, and thereafter was dismissed as a defendant in this action. Defendant OneWest Bank FSB (OneWest) is alleged in the pleading to be a successor in interest to IndyMac.

Following the denial of the loan modification, plaintiff sent a rescission letter to OneWest on June 19, 2009, in which he ostensibly exercised his right to cancel the loan pursuant to the Truth in Lending Act (15 U.S.C. § 1635), and requested a refund of payments and fees along with removal of the deed of trust from the title record. In the rescission letter plaintiff claimed that he was ready and able to tender the amount due minus equitable setoff. By letter dated July 2, 2009, OneWest denied plaintiff's right to rescind as not validly exercised.

On June 11, 2009, Quality recorded a notice of trustee's sale that indicated plaintiff's default and an intent to sell the property on behalf of the foreclosing beneficiary at a public auction on July 1, 2009. The property was sold on January 15, 2010, to defendant Deutsche Bank National Trust Company (Deutsche Bank), the trustee of the IndyMac IMSC Mortgage Loan Trust 2007-F2, under a pooling and servicing agreement dated June 1, 2007. Quality then recorded a trustee's deed upon sale, which conveyed the property to "foreclosing beneficiary" Deutsche Bank.

This action commenced on June 22, 2009, when plaintiff filed a complaint in Napa County Superior Court following receipt of the notice of trustee's sale. After a first amended complaint was filed that included causes of action based on federal statutes (12 U.S.C. § 2601; 15 U.S.C. § 1601; 18 U.S.C. § 1961), the case was removed to the United States District Court for the Northern District of California on the basis of federal question jurisdiction. The federal court subsequently dismissed the federal claims stated in plaintiff's first and second amended complaints without leave to amend, declined to retain supplemental jurisdiction over the remaining state law causes of action, and remanded the case to the Napa County Superior Court.

After defendants' demurrer to plaintiff's second amended complaint was sustained by the trial court with leave to amend, on September 7, 2010, plaintiff filed the third amended complaint, which is at issue in this appeal. The third amended complaint contains causes of action against defendants for wrongful foreclosure, fraud (Civ. Code, § 1572), unfair business practices, and to quiet title. Defendants OneWest and Deutsche Bank demurred to the third amended complaint on the ground that the pleading failed to

state any causes of action. The demurrer was sustained without leave to amend, and this appeal followed.

DISCUSSION

I. The Trial Court's Specification of Reasons for the Order Sustaining the Demurrer.

Plaintiff seems to claim, although quite summarily, that the trial court inadequately stated reasons for sustaining the demurrer. He complains that when a statement of reason was requested the trial court merely stated: "For the reasons set forth at length in the demurrer, plaintiff has failed to state facts to support any cause of action." Plaintiff submits that the court's recitation of reasons failed to comply with the requirements of Code of Civil Procedure section 472d, which provides that in ruling on a demurrer "the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer." (See also *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) Here, defendants demurred on the sole ground that plaintiff failed "to allege facts sufficient to constitute a cause of action" against them. The supporting exhibits and points and authorities submitted by defendants thoroughly explicated the bases for their claim that plaintiff failed to state any causes of action in his third amended complaint. The trial court properly referred to the demurrer itself in its ruling. The statement of reasons both alerted plaintiff to the substance of the court's decision and complied with the mandate of section 472d. (See *Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275; *Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 801; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 943.)

II. The Demurrer Standards.

We turn to an examination of the trial court's ruling on the demurrer in accordance with established standards. "A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law." (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) " 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded.

[Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]' [Citation.]" (*Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 352; see also *Lee v. Blue Shield of California* (2007) 154 Cal.App.4th 1369, 1377–1378.)

The properly pleaded material allegations in the action filed by plaintiff "must be accepted as true. [Citations.] In addition, the Supreme Court has held: ' "[T]he allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties." [Citations.]' [Citations.]" (*C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 382–383.) "In addition to the complaint's allegations, we consider matters that must or may be judicially noticed. [Citations.] We also consider the complaint's exhibits. [Citations.] Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .' [Citations.]" (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400 (*Hoffman*); see also *Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044–1045.)[2]

[2] Appellant's reliance on *Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364–365, at oral argument challenging this fundamental principle is misplaced. There, respondents relied on numerous media reports to establish "judicial notice" the operations at a fertility clinic were suspect and that the litigants assumed the consequences for accepting services. No such reports were included in the complaint challenged in the demurrer. Here, appellant has attached public records reflecting changes in the property foreclosed, his residence. The documents were attached to his TAC and incorporated by reference. They enjoy precedence over inconsistent allegations in the TAC he filed. (*Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 7:47.1, p. 24.)

Our task as a "reviewing court, therefore, 'is to determine whether the pleaded facts state a cause of action on any available legal theory.' [Citation.]" (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 266.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 38.) However, "We may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court." (*State of California ex rel. Metz v. CCC Information Services, Inc*. (2007) 149 Cal.App.4th 402, 412.)

"On appeal from a judgment of dismissal after a demurrer has been sustained without leave to amend, the plaintiff has the burden of proving error. [Citation.] 'Because the trial court's determination is made as a matter of law, we review the ruling de novo.' [Citation.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315.)

III. The Cause of Action for Wrongful Foreclosure.

Plaintiff offers "five separate grounds" for contesting the trial court's determination that the wrongful foreclosure cause of action has no factual basis. Plaintiff's challenges to the court's finding that the alleged facts do not state a wrongful foreclosure cause of action all revolve around an essential claim that for various reasons the foreclosure sale was invalid.

We proceed with our review of plaintiff's wrongful foreclosure sale allegations in light of the nature of the nonjudicial foreclosure scheme. " ' "[Civil Code s]ections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." [Citations.] . . .' [Citation.]" (*California Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1070.) The power of sale in a deed of trust allows a beneficiary recourse to the security without the necessity of a judicial action. (*Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1249.) Absent any evidence to the contrary, a nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly. (Civ. Code,

§ 2924.) However, irregularities in a nonjudicial trustee's sale may be grounds for setting it aside if they are prejudicial to the party challenging the sale. (*Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097–1098.)

"The statutory scheme can be briefly summarized as follows. Upon default by the trustor, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale. [Citations.] The foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee. [Citations.] After the notice of default is recorded, the trustee must wait three calendar months before proceeding with the sale. [Citations.] After the 3-month period has elapsed, a notice of sale must be published, posted and mailed 20 days before the sale and recorded 14 days before the sale. [Citations.] . . . The property must be sold at public auction to the highest bidder." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)[3]

"In a nonjudicial foreclosure, also known as a 'trustee's sale,' the trustee exercises the power of sale given by the deed of trust. [Citations.] Nonjudicial foreclosure is less expensive and more quickly concluded than judicial foreclosure, since there is no oversight by a court, '[n]either appraisal nor judicial determination of fair value is required,' and the debtor has no postsale right of redemption. [Citation.] However, the creditor may not seek a deficiency judgment." (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.) "A properly conducted nonjudicial foreclosure sale constitutes a final adjudication of the rights of the borrower and lender." (*Moeller v. Lien, supra*, 25 Cal.App.4th 822, 831; see also *Smith v. Allen* (1968) 68 Cal.2d 93, 96; *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1516.)

The "elements of an equitable cause of action to set aside a foreclosure sale are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party

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[3] " 'This comprehensive statutory scheme has three purposes: " '(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citations.]" [Citation.]' [Citation.]" (*California Golf, L.L.C. v. Cooper, supra,* 163 Cal.App.4th 1053, 1070.)

attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104 (*Lona*).) " 'In order to challenge the sale successfully there must be evidence of a failure to comply with the procedural requirements for the foreclosure sale that caused prejudice to the person attacking the sale. The mere inadequacy of price, standing alone, does not justify setting aside the trustee's sale, but the sale can be set aside where there is a gross inadequacy of the price paid at the sale, together with a slight irregularity, unfairness, or fraud.' [Citation.]" (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 700.) " 'It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties.' [Citation.] A debtor may apply to a court of equity to set aside a trust deed foreclosure on allegations of unfairness or irregularity that, coupled with the inadequacy of price obtained at the sale, mean that it is appropriate to invalidate the sale." (*Lo v. Jensen, supra,* 88 Cal.App.4th 1093, 1097–1098.)

"Our analysis proceeds on the presumption of validity accorded the foreclosure sale." (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 444.) " 'If the trustee's deed recites that all statutory notice requirements and procedures required by law for the conduct of the foreclosure have been satisfied, a rebuttable presumption arises that the sale has been conducted regularly and properly; this presumption is conclusive as to a bona fide purchaser. [Citations.]' [Citations.]" (*Id.* at p. 441.) "As to a bona fide purchaser, however, the presumption is conclusive." (*Moeller v. Lien, supra,* 25 Cal.App.4th 822, 831.) " 'The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor.' [Citation.]" (*Nguyen, supra,* at pp. 441–442.) However, where the trustor is precluded from suing to set aside the foreclosure

sale, the trustor may still recover damages from the trustee. (*Moeller, supra,* at pp. 831–832.)

A. The Validity of the Assignments.

Plaintiff seeks to recover damages for wrongful foreclosure by arguing that flaws in the sequence of assignment and transfer of interest in the property rendered the foreclosure sale "void." Plaintiff alleged in the wrongful foreclosure sale cause of action that a "derangement of title" resulted from several defects in the chronology and authorization to make the various transfers of the note and deed of trust. As a result, he claims that defendants lacked a "substantive right to collect on [the] note or enforce the deed of trust" by foreclosure sale.

We agree with plaintiff that mistakes in performance of the ministerial acts set forth in the nonjudicial foreclosure statute may result in a void sale and an award of appropriate damages. (See *Pro Value Properties, Inc. v. Quality Loan Service Corp*. (2009) 170 Cal.App.4th 579, 583.) But here, while plaintiff's pleading alleges noncompliance with the procedural requirements for the foreclosure sale, in the nature of defects in the chain of title of the promissory note and deed of trust, the attached exhibits do not support, and even contradict, the allegations in the third amended complaint. In fact, the documents of record indicate that the promissory note and deed of trust passed eventually to Quality as trustee, which recorded a notice of trustee's sale on June 11, 2009. The property was then sold to Deutsche Bank on January 15, 2010.

Plaintiff's complaint is with the defective timing of the assignments, whereby the substitution of IndyMac as trustee was not *recorded* until April 21, 2009, but the assignment from IndyMac to Quality was *executed* on March 9, 2009, before IndyMac had a "vested interest" in the deed of trust. He therefore maintains that the substitution of a trustee "by a party whose interest had not yet vested," and was "unqualified" to transfer an interest, caused the subsequent trustee's sale to be "void and no title transferred."

Plaintiff's claim of ineffective transfers lacks merit for two reasons. First, the instruments were effective without being recorded. (See *Quintero Family Trust v. OneWest Bank, F.S.B.* (S.D.Cal. June 25, 2010, No. 09-CV-1561-IEG (WVG)) 2010

U.S.Dist. Lexis 63659, *24 (*Quintero*); *Ohlendorf v. Am. Home Mortgage Servicing* (E.D.Cal. March 31, 2010) No. Civ. S-09-2081 LKK/EFB, 2010 U.S.Dist. Lexis 31098.)

Second, the timing of the effect of the assignments is of no legal consequence to the ultimate validity of the foreclosure sale and plaintiff's entitlement to relief. Absent prejudice, any mistake in the execution and recording of the assignments does not warrant relief. (See *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93–94 & fn. 9.) Plaintiff did not suffer any prejudice as a result of the sequence of the transfers. (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 231–232.) This is not a case in which an trust deed beneficiary assignee failed to record or obtain a beneficial interest in the deed of trust before nonjudicial foreclosure was initiated. (Cf., *Tamburri v. Suntrust Mortgage, Inc*. (N.D.Cal. Dec. 15, 2011, C-11-2899 EMC) 2011 U.S.Dist. Lexis 144442; *Sacchi v. Mortgage Electronic Registration Systems, Inc.* (C.D.Cal. June 24, 2011, No. CV 11-1658 AHM (CWx)) 2011 U.S.Dist. Lexis 68007, 2011 WL 2533029, at *9–*10; *In re Cruz* (Bankr. S.D.Cal. 2011) 457 B.R. 806, 2011 Bankr. Lexis 3080.) The sole critical truth indisputably revealed by the documents is that long before the date of the notice of trustee's sale on June 11, 2009, Quality became the designated trustee. The substitution of Quality as trustee under the deed of trust became effective no later than when the substitution was recorded on April 21, 2009. Civil Code section 2934a, subdivision (a)(4) provides in part: "From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust." Any defect in the previous recording sequence of the instruments did not render the subsequent foreclosure proceeding and sale void once Quality succeeded as trustee when the substitution was recorded. (Civ. Code, § 2934a, subd. (a)(4).) The notice of default and sale was filed and recorded by the properly designated trustee. (*Aceves v. U.S. Bank N.A., supra*, at p. 232.) Thus, the notice of sale by Quality, long after its substitution as trustee took effect, was valid.

Plaintiff also alleged, rather indistinctly, in his third amended complaint that MERS, as RMC's nominee, was not empowered to assign the deed of trust, and therefore had no authority to assign its beneficial interest in the deed of trust to defendant IndyMac

on February 24, 2009. Plaintiff seems to assert that as a mere "nominee" MERS had "no power of attorney" or "beneficial interest" to alienate the deed of trust to IndyMac. Plaintiff also alleges that RMC "alienated the Note long before" MERS assigned beneficial interest in it to IndyMac.

Looking first at the authority of MERS, acting in the capacity of nominee for the lender and its successors, to assign the interest, we observe that the "MERS System" is a "method devised by the mortgage banking industry to facilitate the securitization of real property debt instruments." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*).) " 'MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.' [Citation.] 'A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.' [Citation.]" (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151 (*Gomes*); see also *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking & Finance* (2005) 270 Neb. 529 [704 N.W.2d 784].) MERS "is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Fontenot, supra,* at p. 267.)

We are persuaded by recent case law that plaintiff cannot state a cause of action based on the alleged lack of authority of MERS as a designated noteholder or nominee to initiate a foreclosure proceeding. (*Robinson v. Countrywide Home Loans, Inc*. (2011) 199 Cal.App.4th 42, 46–47 (*Robinson*); *Gomes, supra,* 192 Cal.App.4th 1149, 1154–1159.) In light of the nature and purpose of the nonjudicial foreclosure process, which is

less expensive and more quickly concluded without oversight by a court than judicial foreclosure, the court in *Gomes* declared: "The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Gomes, supra*, at p. 1155.) The court also concluded: "Because California's nonjudicial foreclosure statute is unambiguously silent on any right to bring the type of action" (*id*. at p. 1156) to "determine whether the person initiating the foreclosure process is indeed authorized," (*id.* at p. 1155) "there is no basis for the courts to create such a right." (*Id.* at p. 1156.)

We further conclude that even if we recognized a legal basis for an action to determine whether MERS has authority to initiate a foreclosure proceeding, the deed of trust—which plaintiff attached to his third amended complaint—establishes as a factual matter that his claims lack merit. (*Gomes, supra*, 192 Cal.App.4th 1149, 1157.) The deed of trust executed by plaintiff explicitly granted MERS the right to take any action on behalf of the lender, specifically including to proceed with foreclosure and sale of the property. Civil Code section 2924, subdivision (a)(1) also grants a "trustee, mortgagee or beneficiary, or any of their authorized agents" the authority to conduct the foreclosure process; under Civil Code section 2924b, subdivision (b)(4), a " 'person authorized to record the notice of default or the notice of sale' " includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." "There is no stated requirement in California's non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the statute does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale." (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1099 (*Lane v. Vitek*).) The courts have consistently ruled "that MERS has standing to foreclose as the nominee for the lender and beneficiary

of the Deed of Trust and may assign its beneficial interest to another party." (*Ibid*.; see also, *Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 125; *Robinson, supra*, 199 Cal.App.4th 42, 47; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 334–335.)

Moreover, any lack of possessory interest in the note on the part of MERS did not prevent MERS from exercising valid authority to assign the note. As this court declared in *Fontenot, supra*, 198 Cal.App.4th 256, 270–271: "While it is true MERS had no power *in its own right* to assign the note, since it had no interest in the note to assign, MERS did not purport to act for its own interests in assigning the note. Rather, the assignment of deed of trust states that MERS was acting as nominee for the lender, which *did* possess an assignable interest. A 'nominee' is a person or entity designated to act for another in a limited role—in effect, an agent. [Citations.] The extent of MERS's authority as a nominee was defined by its agency agreement with the lender, and whether MERS had the authority to assign the lender's interest in the note must be determined by reference to that agreement." The agreement that expressly furnished MERS with authority to assign the note or take any action on behalf of the lender belies any allegation of an invalid assignment. (*Id*. at p. 271.) And, "[e]ven if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor." (*Id*. at p. 272.) The assignment by MERS merely substituted one creditor for another, without changing plaintiff's obligations under the note, and neither interfered with his payment of the note nor caused the default.

Plaintiff's allegations related to resale of the loan and deed of trust into a "Loan Trust Pool" also do not state a cause of action to invalidate the foreclosure sale. (See *Lane v. Vitek, supra*, 713 F.Supp.2d 1092, 1099; *Benham v. Aurora Loan Services* (N.D.Cal. Sept. 1, 2009, C-09-259 SC) 2009 U.S.Dist. Lexis 91287, 2009 WL 2880232, at *3; *Hafiz v. Greenpoint Mortg. Funding, Inc.* (N.D.Cal. 2009) 652 F.Supp.2d 1039, 1043.) And again, upon our examination of the documents, we find no defect in the sequence of assignments that in any way voids the foreclosure sale. We find that MERS

had the authority to assign a beneficial interest in the note to IndyMac, which in any event cannot be challenged by plaintiff with the present action for wrongful foreclosure. (*Morgera v. Countrywide Home Loans Inc.* (E.D.Cal. Jan. 11, 2010, No. 2:09-CV-01476-MCE-GGH) 2010 U.S.Dist. Lexis 2037, WL 160348 at *8; *Lane v. Vitek, supra,* at p. 1099.)

B. Plaintiff's Claim of a Modification of the Agreement.

Plaintiff also argues that his pleading of wrongful foreclosure is properly based on allegations of a modification of the loan agreement with IndyMac and his tender of a payment. Plaintiff asserts that he accepted and "performed under" the loan modification agreement provided to him by IndyMac in March of 2009, by signing the agreement on April 4, 2009, and sending a financial statement along with a check for $2,822.20 as specified. He adds that his acceptance of IndyMac's offer created "a valid and enforceable contract," which IndyMac "breached" by rejecting his "proper tender thereunder." He also claims that the modified agreement was binding on IndyMac's successors.

We first observe that plaintiff did not make an adequate tender to avoid foreclosure. A credible offer to tender the full amount of the indebtedness by the borrower is necessary to set aside a foreclosure sale under a deed of trust. (See *Shimpones v. Stickney* (1934) 219 Cal. 637, 649; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117–118; *Crummer v. Whitehead* (1964) 230 Cal.App.2d 264, 268; *Py v. Pleitner* (1945) 70 Cal.App.2d 576, 581–582.) A tender is an offer of performance made with the intent to extinguish the obligation. (Civ. Code, § 1485.) It must be unconditional and offer full performance to be valid. (Civ. Code, §§ 1486, 1494.) "[I]n the context of overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust. [Citations.] This requirement is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose." (*Dimock v.*

Emerald Properties (2000) 81 Cal.App.4th 868, 877–878.) Plaintiff claimed that he sent IndyMac a check for $2,822.20, but has not alleged the requisite offer to extinguish the obligation. (*Lipscomb v. Mortgage Electronic Registration System Inc.* (E.D.Cal. Aug. 3, 2011, No. 1:11-CV-497 AWI JLT) 2011 U.S.Dist. Lexis 85503 at *13, WL 3361132 at *7, and cases cited therein.)

We also conclude that no binding modification of the existing loan agreement was executed by the parties. The proposed agreement sent to plaintiff by IndyMac was conditioned upon events that did not occur. The agreement expressly stated that it was binding only upon a determination by IndyMac that plaintiff was qualified for the modified loan after verification of income information, and only if the modification was signed by IndyMac. Plaintiff was never determined to be qualified for the modification, and IndyMac never signed the agreement.

"An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event." (Civ. Code, § 1434.) And, "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section." (Civ. Code, § 1439.) "[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313.) Where " 'a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.' " (*Bustamante v. Intuit, Inc*. (2006) 141 Cal.App.4th 199, 209, quoting *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

Plaintiff was not fully able to perform or make a tender of the promised performance, and without occurrence of the conditional events of determination of plaintiff's qualification for the modified loan and acceptance by IndyMac, the proposed

loan modification never became a binding agreement. (See *Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53–54.) Plaintiff has alleged at best a conditional promise, rather than the necessary contract modification " 'clear and unambiguous in its terms' " (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1037.) The wrongful foreclosure cause of action cannot be premised on allegations of the existence and performance of a modified loan agreement. (*McElroy v. Chase Manhattan Mortg. Corp*. (2005) 134 Cal.App.4th 388, 394.)

C. Deutsche Bank as a Valid Beneficiary at the Time of the Foreclosure Sale.

The wrongful foreclosure cause of action in the third amended complaint additionally alleges that "there is NO recorded assignment" to Deutsche Bank in the chain of title. Therefore, the pleading further alleges, the "credit bid" for the property was "illegal and fraudulent." Plaintiff relies on a single, unsupported reference to Civil Code section 2924h to argue very cursorily that a trustee cannot accept a bid "not paid in cash or check at the time of sale" from other than a "record beneficiary." He adds that the "trustee was not empowered to transfer title on such an unqualified credit bid, and the transfer is of no effect."

The exhibits attached to the pleading, which we must accord preference over plaintiff's inconsistent conclusory allegations in our review of the ruling on the demurrer, indicate in the trustee's deed upon sale recorded January 22, 2010, that Deutsche Bank is the "foreclosing beneficiary" as "Trustee of IndyMac" under the pooling agreement. The notarized trustee's deed also recites that Deutsche Bank paid the amount of $396,247.51 in *lawful money* of the United States, or by the satisfaction, pro tanto, of the obligations then secured by said Deed of Trust." (Italics added.) The trustee's deed therefore contradicts both the pleading and plaintiff's claim that Deutsche Bank was not the foreclosing beneficiary and made an unlawful *credit* bid for the property.

Moreover, Civil Code section 2924h does not support plaintiff's argument. Subdivision (b) of Civil Code section 2924h provides that "the *trustee shall have the right*" to require every bidder to show evidence of the bidder's ability to deposit with the trustee the full amount of his or her final bid in cash, a cashier's check," or a qualifying

check, but does not articulate that the trustee must accept only a cash or check payment from a buyer other than the beneficiary.[4] In fact, subdivision (d) of the statute specifies the foreclosure sale procedure to be followed if the trustee "has not required the last and highest bidder to deposit" cash or a check for the purchase price.

The full "credit bid" rule to which plaintiff briefly refers in his argument merely provides that " '[a]t a nonjudicial foreclosure sale, if the lender chooses to bid, it does so in the capacity of a purchaser. [Citation.] The only distinction between the lender and any other bidder is that the lender is not required to pay cash, but is entitled to make a credit bid up to the amount of the outstanding indebtedness. [Citations.] The purpose of this entitlement is to avoid the inefficiency of requiring the lender to tender cash which would only be immediately returned to it. [Citation.] A "full credit bid" is a bid "in an amount equal to the unpaid principal and interest of the mortgage debt, together with the costs, fees and other expenses of the foreclosure." [Citation.] If the full credit bid is successful, i.e., results in the acquisition of the property, the lender pays the full outstanding balance of the debt and costs of foreclosure to itself and takes title to the security property, releasing the borrower from further obligations under the defaulted note. [Citation.]' [Citation.]" (*First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 737.) "[A] foreclosing lender that has purchased the real property

[4] Subdivision (b) of Civil Code section 2924h reads in full: "(b) At the trustee's sale the trustee shall have the right (1) to require every bidder to show evidence of the bidder's ability to deposit with the trustee the full amount of his or her final bid in cash, a cashier's check drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state, or a cash equivalent which has been designated in the notice of sale as acceptable to the trustee prior to, and as a condition to, the recognizing of the bid, and to conditionally accept and hold these amounts for the duration of the sale, and (2) to require the last and highest bidder to deposit, if not deposited previously, the full amount of the bidder's final bid in cash, a cashier's check drawn on a state or national bank, a check drawn by a state or federal credit union, or a check drawn by a state or federal savings and loan association, savings association, or savings bank specified in Section 5102 of the Financial Code and authorized to do business in this state, or a cash equivalent which has been designated in the notice of sale as acceptable to the trustee, immediately prior to the completion of the sale, the completion of the sale being so announced by the fall of the hammer or in another customary manner. The present beneficiary of the deed of trust under foreclosure shall have the right to offset his or her bid or bids only to the extent of the total amount due the beneficiary including the trustee's fees and expenses."

security for such a bid is precluded from pursuing further claims to recoup its debt, because the bid has established that the foreclosed security is equal in value to the debt, which therefore has been satisfied." (*Countrywide Home Loans, Inc. v. Tutungi* (1998) 66 Cal.App.4th 727, 731.) The rule has no application where, as here, the purchaser at a foreclosure sale, designated as the "foreclosing beneficiary," purchased the property for far less than the amount of indebtedness and is not attempting to pursue an action against the borrower or a third party for additional payment.

D. The Claim of Falsified Documents.

Plaintiff further argues that the deed of trust documents were "falsified, signed by people without authority to execute them, and were fraudulently notarized outside the presence of a notary." In plaintiff's first cause of action for wrongful foreclosure, the only allegation of fallacious or misleading documents – and the only allegation plaintiff refers to in this appeal – is that IndyMac substituted Quality as trustee before it received and recorded a beneficial interest in the deed of trust on April 10, 2009. We have already found that the succession of interest in the deed of trust was valid, and did not prejudice plaintiff. Therefore, his claim of falsification documents in the first cause of action also fails.

Finally, in contrast to *Lona, supra*, 202 Cal.App.4th 89, plaintiff has not alleged as a basis for his wrongful foreclosure cause of action "that the trustee's sale was void because the underlying loans and deeds of trust were unconscionable, illegal, and void at the inception." (*Id*. at p. 107.) Nothing in the pleading before us suggests that the terms of the loan were overly harsh and one-sided, or otherwise substantively unconscionable, facts that were found to support a wrongful foreclosure cause of action in *Lona*. (*Id*. at pp. 109–111.) Plaintiff has failed to properly allege a cause of action for wrongful foreclosure.

IV. The Fraud Cause of Action.

In the second cause of action for fraud (Civ. Code, § 1572), plaintiff included additional allegations of false representations related to the note and deed of trust: that defendants misrepresented their right to payment under the note and the concomitant

right to proceed with a nonjudicial foreclosure; defendants added unjustified costs under the terms of the note; unspecified declarations in the exhibits were "knowing and intentional" misstatements; on information and belief, that Ericka Johnson Seck had no authority to assign the deed of trust from MERS to IndyMac on February 24, 2009. Plaintiff further alleged that defendants Quality, Deutsche Bank and OneWest made misrepresentations of material facts related to: the "hiding of third parties at loan consummation" and "securitization" of the loan; OneWest's lack of interest in the loan; and defendants' lack of standing to foreclose on the loan. Plaintiff claims in this appeal that he properly "detailed his fraud allegations," and the use of "an admitted and known robo-signer to fabricate documents" by defendants as part of a scheme to unlawfully use the "non-judicial foreclosure process constitutes fraud."

Although a bid at a trustee's sale is deemed by statute to be an irrevocable offer by that bidder to purchase the property for that amount (Civ. Code, § 2924h, subd. (a)), " '[i]t is the general rule that courts have power to vacate a foreclosure sale where . . . the sale . . . is tainted by fraud . . . .' [Citations.]" (*Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal.4th 1226, 1237.) The elements of a fraud claim are: (1) defendant misrepresents or conceals material facts; (2) with knowledge of the falsity of the representations or the duty of disclosure; (3) with intent to defraud or induce reliance; (4) which induces justifiable reliance by the plaintiff; (5) to his or her detriment. (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 748.) In order to prevail, the plaintiff must allege and prove that he or she actually relied upon the misrepresentations and, in the absence of fraud, would not have entered into the contract or transaction. (The *MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1530.)

" 'In California, fraud must be pled specifically; general and conclusory allegations do not suffice.' [Citation.]" (*Citizens of Humanity, LLC v. Costco Wholesale Corp*. (2009) 171 Cal.App.4th 1, 20.) " ' " ' 'Thus " 'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.' " [Citation.] . . .' " ' " (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384, quoting from

Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal.4th 979, 993.) The specificity requirement " 'serves two purposes. First, it gives the defendant notice of the definite charges to be met. Second, the allegations "should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus the pleading should be sufficient ' "to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." ' " . . . Thus, *a plaintiff must plead facts which show how, when, where, to whom, and by what means the representations were made*. . . . When the defendant is a corporate defendant, the plaintiff must further allege *the names of the persons who made the representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written*. . . .' " (*Wald v. TruSpeed Motorcars, LLC* (2010) 184 Cal.App.4th 378, 393–394.) " 'Less specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." ' [Citation.]" (*Citizens of Humanity, LLC v. Costco Wholesale Corp., supra,* at p. 20.)

Here, plaintiff's allegations that defendants lack a valid property interest to assign the deed of trust as necessary to proceed with foreclosure are contradicted by the attached documents. (*Soifer v. Chicago Title Co.* (2010) 187 Cal.App.4th 365, 374 (*Soifer*).) His remaining charges of fraud are conclusory or improperly based on information and belief. (*Quintero, supra,* 2010 U.S. Dist. Lexis 63659, *25.) The bare allegations of fraud against OneWest and Deutsche Bank, without factual support or identification of anyone who made fraudulent representations or was required to disclose facts to plaintiff, are inadequate to sustain an action for fraud. (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1622.) The particularity requirement associated with allegations of a fraud cause of action " 'necessitates pleading facts which "show how, when, where, to whom, and by what means the representations were tendered." ' [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote,

and when it was said or written.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645, italics omitted, quoting *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73, and *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157; see also *Murphy v. BDO Seidman, LLP* (2003) 113 Cal.App.4th 687, 692.) Plaintiff's allegations of fraud in the present case are simply not specific enough to show the factual basis of a fraud cause of action. (See *Gil v. Bank of America, N.A.* (2006) 138 Cal.App.4th 1371, 1381.) Nothing in the nature of factually specific allegations of fraud is found in the second cause of action, as are necessary to survive a demurrer. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347–348; *Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 423.)

V. The Unfair Business Practices Cause of Action.

Plaintiff claims that the trial court erred by sustaining a demurrer to his cause of action for unfair business practices (Bus. & Prof. Code, § 17200 et seq.), which is based on defendants' "failure to honor his timely rescission," sent on June 19, 2009, "prior to its wrongful foreclosure." Plaintiff insists that he therefore properly "stated facts to void" the foreclosure sale in light of the unaccepted rescission demand, so his "section 17200 claim based on [the federal Truth in Lending Act (15 U.S.C. § 1601 et seq.)] must survive."

To state a claim for unfair business practices pursuant to Business and Professions Code section 17200, a plaintiff must allege that a defendant engaged in an "unlawful, unfair or fraudulent business act or practice" or in "unfair, deceptive, untrue or misleading advertising." Because the statute does not proscribe specific acts and is written in the disjunctive, it applies separately to business practices that are either unlawful, unfair, or fraudulent. (*Pastoria v. Nationwide Ins.* (2003) 112 Cal.App.4th 1490, 1496.) " '[A] business practice need only meet one of the three criteria to be considered unfair competition.' [Citation.]" (*Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373, 1381; *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1335.)

Even if a lender's violation of TILA may be an unfair business practice, plaintiff did not effectuate a timely rescission of the loan agreement. TILA requires lenders to make certain, specified disclosures in connection with consumer loans (15 U.S.C. § 1638),[5] and when a credit transaction includes the lender taking a security interest in the debtor's principal residence, the debtor must also be informed of a right to rescind the transaction. This right applies for up to three days after consummation of the transaction or the date the creditor delivers notice of the right to rescind and the other TILA disclosures, whichever is later, up to a maximum of three years. (15 U.S.C. § 1635; see also *Holbert v. Fremont Investment & Loan* (2009) 179 Cal.App.4th 1067, 1075.) In his letter dated June 19, 2009, plaintiff attempted to rescind the proposed loan modification agreement sent to plaintiff by IndyMac on March 10, 2009, which, we have found, never became a valid contract. Plaintiff did not allege that he made a timely rescission of the original loan agreement dated April of 2007, and the proposed loan modification he purportedly rescinded in June of 2009 was not a final, binding agreement. No violation of the federal Truth in Lending Act has been properly alleged by plaintiff.

As an alternative foundation for his unfair business practices action, plaintiff argues that he relied on the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.).[6] He maintains without any argument whatsoever that his allegations of "violation of Rosenthal Act" in the third amended complaint should have been accepted as true by the trial court, and the "demurrer should therefore have been overruled as to this cause of action." Plaintiff has not offered any explanation as to the merits of his Rosenthal Act allegations. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215.)

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[5] Among other things, the lender must disclose the amount financed (15 U.S.C. § 1638(a)(2)(A)), the "finance charge" (*id.* § 1638(a)(3)), "[t]he number, amount, and due dates or period of payments scheduled to repay the total of payments" (*id.* § 1638(a)(6)), and a statement indicating whether or not the debtor is subject to a prepayment penalty (*id.* § 1638(a)(11)).

[6] Also known as the Rosenthal Act or the RFDCPA.

In any event, plaintiff failed to allege that defendants are debt collectors, and foreclosure pursuant to a deed of trust does not constitute debt collection under the Rosenthal Act provisions. (See *Zakar v. CHL Mortgage Pass-Through Trust 2006* (S.D.Cal. Oct. 13, 2011, No. 11cv0457 AJB (WVG)) 2011 U.S.Dist. Lexis 118763, *12–*13; *Castaneda v. Saxon Mortg. Servs., Inc*. (E.D.Cal. 2009) 687 F.Supp.2d 1191, 1197; *Izenberg v. ETS Servs., LLC* (C.D.Cal. 2008) 589 F.Supp.2d 1193, 1199.) The " 'law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the RFDCPA.' [Citation.] '[F]oreclosure pursuant to a deed of trust does not constitute debt collection under the RFDCPA.' [Citations.]. The conduct Plaintiff complains of concerns foreclosure related actions in connection with his residential mortgage. This conduct is not covered by the RFDCPA." (*Sipe v. Countrywide Bank* (E.D.Cal. 2010) 690 F.Supp.2d 1141, 1151.)

To the extent that plaintiff's unfair business practices cause of action is predicated on defendants' purported violations of TILA and the Rosenthal Act, it fails as a matter of law. Without the predicate TILA or Rosenthal Act violations, there can be no Business & Professions Code section 17200 claim for unlawful business practices. (See *Rosal v. First Federal Bank of California* (N.D.Cal. 2009) 671 F.Supp.2d 1111, 1126-1127; *Hafiz v. Greenpoint Mortg. Funding, Inc., supra,* 652 F.Supp.2d 1039, 1049; *Rubio v. Capital One Bank* (*USA*), *N.A.* (C.D.Cal. 2008) 572 F.Supp.2d 1157, 1168.) To the extent that plaintiff is proceeding under the "fraudulent" prong of Business & Professions Code section 17200, he has not adequately pleaded fraud. (*Lane v. Vitek, supra,* 713 F.Supp.2d 1092, 1102–1103; see also *Rosal v. First Federal, supra,* at p. 1127.) Demurrer to the unfair business practices cause of action was properly sustained. (*Garcia v. World Savings, FSB, supra,* 183 Cal.App.4th 1031, 1037–1038.)

VI. The Quiet Title Cause of Action.

We reach plaintiff's quiet title cause of action. Plaintiff summarily argues that the "substitution of trustee was void," the signatures on the assignment of the deed of trust "were unlawfully backdated," and the loan modification agreement was properly accepted by IndyMac. Therefore, he has stated "ample facts giving rise to a claim for

quiet title" against defendants. We have concluded that the allegations and documents do not indicate any fatal deficiencies in the assignments, or any valid loan modification and tender. Therefore, his quiet title cause of action has no merit.

VII. Sustaining the Demurrer Without Leave to Amend.

Where, as here, a demurrer is sustained without leave to amend, we also review the decision to deny leave to amend under the abuse of discretion standard, even when no request to amend the pleading was made. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) In doing so, we decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Whitemore v. Owens Healthcare-Retail Pharmacy, Inc.* (2010) 185 Cal.App.4th 1194, 1199.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 459; see also, e.g., *Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 810; *Quelimane Co. v. Stewart Title Guaranty Co., supra*, 19 Cal.4th 26, 39.) "Nevertheless, where the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*City of Atascadero, supra*, at p. 459.)

We conclude that there is no reasonable possibility the defects in the third amended complaint may be cured by yet another amendment of plaintiff's pleading. Plaintiff was granted ample opportunity and instruction from the trial court to cure the defects in his pleading, but failed to do so. "Plaintiff had already filed three versions of the complaint at the time the trial court entered its order, each one unsuccessful in stating a cause of action." (*Fontenot, supra*, 198 Cal.App.4th 256, 274.) His third amended complaint is unsuccessful not because he is an imperceptive or inartful pleader, but because neither the properly asserted facts nor the remaining conclusory allegations state the requisite elements of his causes of action. (*Schauer v. Mandarin Gems of Cal., Inc*. (2005) 125 Cal.App.4th 949, 961.) Therefore, the trial court did not abuse its discretion

by sustaining defendants' demurrer without leave to amend. (*Fontenot, supra*, at pp. 274–275; *Gomes, supra*, 192 Cal.App.4th 1149, 1158–1159; *Soifer, supra*, 187 Cal.App.4th 365, 374.)

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.